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In The

Supreme Court of the United States

October Term, 1996

INTER-MODAL RAIL EMPLOYEES ASSOCIATION, ET AL.,

Petitioners,

v.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT IN-TERMINAL SERVICES

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QUESTION PRESENTED

Section 510 of ERISA, 29 U.S.C. § 1140, makes it unlawful to "discharge . . . or discriminate against a participant . . . for the purpose of interfering with the attainment of any rights to which such participant may become entitled under the plan" or under provisions of ERISA. The question presented for review is:

Does Section 510 impose restrictions on an employer's right to subcontract or outsource work, where the employer's reasons include the desire to reduce the cost of a collectively-bargained employee welfare benefit plan, and where such actions are taken in accordance with the collective bargaining process mandated by the National Labor Relations Act?

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 8

I. SETTLED LAW UNDER THE NATIONAL LABOR RELATIONS ACT PERMITS THE CONDUCT AT ISSUE IN THIS CASE 8

A. Overview of Subcontracting and Successorship Principles Under the National Labor Relations Act 8

B. The Change in Teamster-Sponsored Health Benefits Resulting from the Subcontract to ITS Does Not Violate Section 510 14

II. SECTION 510 DOES NOT SUPPORT A CLAIM UNDER THE ALLEGATIONS PRESENTED HERE 20

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Chemical and Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 92 S.Ct. 383, 30 L.Ed.2d 341 (1971) 11

Curtiss-Wright Corp. v. Schoonejongen, ___ U.S. ___, 115 S.Ct. 1223 (1995) 23

Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 107 S.Ct. 2225 (1987) 13, 14

Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964) 9, 11, 12, 13

First National Maintenance Corp. v. NLRB, 452 U.S. 666, 101 S.Ct. 2573, 69 L.Ed.2d 318 (1981).....11, 12

Golden State Bottling Co. v. NLRB, 414 U.S. 168, 94 S.Ct. 414, 38 L.Ed.2d 388 (1973)..... 13

Howard Johnson Co. v. Detroit Local Exec. Bd, 417 U.S. 249, 94 S.Ct. 2236, 41 L.Ed.2d 46 (1974) ...13, 17

Kramer v. Time Warner, Inc., 937 F.2d 767 (2d Cir. 1991)..... 3

Laborers Health & Welfare Trust Fund etc. v. Advanced Lightweight Concrete Co., 484 U.S. 539, 108 S.Ct. 830, 98 L.Ed.2d 936 (1988)..... 16

Litton Financial Printing v. NLRB, 501 U.S. 190, 111 S.Ct. 2215, 115 L.Ed.2d 177 (1991) 10

NLRB v. Burns International Security Services, Inc., 406 U.S. 272, 92 S.Ct. 1571, 32 L.Ed.2d 61 (1972) 13

TABLE OF AUTHORITIES – Continued

Page

NLRB v. Cutter Dodge, Inc., 825 F.2d 1375 (9th Cir. 1987) 13

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937) 10

NLRB v. Katz, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962) 11

NLRB v. Lion Oil Co., 352 U.S. 282, 77 S.Ct. 330 (1957) 19

NLRB v. Wooster Division of Borg-Warner Corporation, 356 U.S. 342, 78 S.Ct. 718 (1958) 10

Spruce Up Corporation, 209 N.L.R.B. 194 14

Stone Boat Yard v. NLRB, 715 F.2d 441 (9th Cir. 1983), cert. denied, 466 U.S. 937, 104 S.Ct. 1910, 80 L.Ed.2d 459 (1994) 10

Wholesale & Retail Food Employees (Teamsters) Local 63 v. Santa Fe Terminal Services, Inc., 826 F.Supp. 326 (C.D. Cal. 1993) 3

STATUTES & RULES

ERISA, 29 U.S.C. § 1140 ..... 4, 22

Federal Rules of Civil Procedure

Rule 12(b)(6) 1, 2, 3

Federal Rules of Evidence

Rule 201 3

Rule 201(f) 3

Labor-Management Relations Act, 29 U.S.C.

§ 186(c)(5) 2, 16, 19

TABLE OF AUTHORITIES – Continued

Page

National Labor Relations Act, 29 U.S.C.

§ 151 et seq 6, 8, 9

§ 157 10

§ 158(a), (b), (c) & (e) 10

§ 158(d) 10, 19

WARN (Worker Adjustment & Retraining Notification Act), 29 U.S.C.

§ 2101 *et seq.* 3

STATEMENT OF THE CASE

The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe")[1] owned a railroad terminal in Los Angeles, California, known as the Hobart Terminal or Hobart Yard. (Pet. App. 24a, ¶13.) For several years prior to 1990, the Hobart Terminal was operated by a wholly-owned subsidiary of Santa Fe, Santa Fe Terminal Services ("SFTS"). (*Id.* at 25a, ¶15.) Santa Fe allegedly exercised "day-to-day" control over the operations of SFTS at the Hobart Terminal. (*Id.* at 22a, ¶8.) SFTS' employees at the terminal were represented for purposes of collective bargaining by locals of the Teamsters Union ("Union"), (*id.* at 26a, 27a, ¶¶19, 23), with which SFTS had a collective bargaining agreement that provided for a "Teamsters Union health and welfare benefit fund," as well as various other benefits to these employees.[2]

In early 1990, Santa Fe notified SFTS that it was terminating its contract with that company, and would solicit "bids" on the work at the Hobart Terminal. (Pet. App. 27a, ¶22.) Shortly thereafter, SFTS notified the

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[1] Santa Fe is the predecessor of the Burlington Northern and Santa Fe Railway Company.

[2] Petitioner Inter-Modal Rail Employees Association's ("Association" or "Petitioner") complaint was dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim. In the procedural posture of the case in this Court, the well-pleaded allegations in the Association's complaint must be accepted as true solely for purposes of this proceeding. The factual recitation in this brief is based upon the complaint, upon the representations of the Association in its brief filed herein, and upon ITS' Request to the Court to Take Judicial Notice.

Union that it might have to cease operations at the Hobart Terminal. (*Id.* at ¶23.) As a result of the bidding, the contract to perform work at the Hobart Terminal was awarded to Respondent In-Terminal Services ("ITS"). (*Id.* at ¶26.) ITS invited all of the Union-represented employees to apply for a position, and upon assuming operations at the Hobart Terminal, hired them, including the individual Petitioners. (Pet. Brief at 4; Pet. App. 28a, ¶29.) After the change, these individuals, now employees of ITS, continued to be represented by the Union, and to be covered by a collective bargaining agreement that provided for health benefits under a Teamster-sponsored plan.[3] Under the new collective bargaining agreement, however, "contributions and benefits" were less than they had been under the collective bargaining agreement between SFTS and the Union. (Pet. App. 28a, ¶30.) ITS did not continue contributions on behalf of these employees to the Railroad Retirement Board.[4] (*Id.*) There is no hint in the record, and certainly no allegations in the complaint, that the Union challenged the termination of SFTS' employees at the Hobart Yard, or ITS' hire of these employees under modified terms and conditions of

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[3] The complaint does not specifically allege that ITS had a collective bargaining agreement with the Union. However, ITS could not legally make contributions to union pension and health and welfare funds on behalf of these employees in the absence of such an agreement. *See* 29 U.S.C. § 186(c)(5). Accordingly, the existence of this continuing collective bargaining relationship is necessarily implied by the complaint, and may be considered in determining a motion under Rule 12(b)(6).

[4] As a "non-railroad employer," (Pet. Brief at 4), ITS had no obligation to contribute to the Railroad Retirement Board.

employment.[5] As set forth in ITS' Request to the Court to Take Judicial Notice,[6] no unfair labor practice charges were filed in connection with the events upon which the complaint is based, nor did the Union file any grievances or lawsuits challenging the decision to subcontract.[7]

Despite the Union's acquiescence in this change of terminal operators, on July 17, 1992, over two years after ITS assumed operation of the Hobart Terminal, five former SFTS (then ITS) employees, together with the Association apparently formed for this express purpose,[8]

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[5] The Union did file a claim under the WARN Act, 29 U.S.C. § 2101 *et seq.*, that resulted in SFTS' liability for six days pay. *Wholesale & Retail Employees (Teamsters) v. Santa Fe Terminal Services, Inc.*, 826 F.Supp. 326 (C.D. Cal. 1993).

[6] The Court may take judicial notice under Rule 201 of the Federal Rules of Evidence of the absence of any unfair labor practice charges, grievances or lawsuits. Such notice may be taken "at any stage of the proceeding," Rule 201(f), and may be considered in connection with a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Kramer v. Time Warner, Inc.*, 937 F.2d 767 (2d Cir. 1991) (judicial notice of content of public records submitted to SEC properly considered in Rule 12(b)(6) motion).

[7] As discussed below, ITS' conduct was entirely in accord with the National Labor Relations Act. Indeed, ITS went beyond what that statute requires. ITS' actions in hiring Petitioners and all of their co-workers, recognizing the Union, and negotiating a successor collective bargaining agreement with the Union, none of which is a requirement under the NLRA, appear to form the basis for Petitioners' claims that ITS "conspired" with the other Respondents to reduce Petitioners' health benefits, and thereby violate Section 510.

[8] The Ninth Circuit held that the Association lacked standing to bring this action. (Pet. App. 6a.) That issue is not before the Court.

brought this action. Petitioners alleged that Santa Fe, SFTS and ITS "conspired" together to violate Section 510 of ERISA, 29 U.S.C. § 1140. (Pet. App. 30a, ¶37.) Petitioners primarily based this claim on the cessation of contributions to the Railroad Retirement Board, but also assert that the reduction in "contributions" and "benefits" under the Teamster-sponsored pension and health and welfare plans was a violation of Section 510. (*Id.* at ¶38.)

The district court dismissed all of Petitioners' claims on the pleadings. On appeal, the Ninth Circuit held, *inter alia*, that the Section 510 claims based upon the Teamster health plan were properly dismissed. The court below reasoned that Section 510 "does not prohibit an employer from altering the package of medical benefits that it provides its employees, but only from interfering with an employee's use of the benefits provided." (Pet. App. 8a, *citing DeVoll v. Burdick Painting, Inc.* 35 F.3d 408, 411 (9th Cir. 1994). An employer is free under ERISA to amend or entirely eliminate a health benefit plan, the court explained, because "existence of a present 'right' is a prerequisite to section 510 relief, and employees have no present 'right' to future, anticipated welfare benefits." (Pet. App. 9a, *citing West v. Greyhound Corp.*, 813 F.2d 951, 954 (9th Cir. 1987). For the same reason, the court held, the modification of Teamster health benefits that resulted from Santa Fe's decision to subcontract operations at the Hobart Terminal to ITS, and ITS' negotiations with the Union, was not a violation of Section 510. (*Id.*)

SUMMARY OF ARGUMENT

This Court has granted certiorari on the question of whether these facts and allegations present a viable claim under Section 510 with respect to the Teamster health plan. Nothing in the language or legislative history of Section 510 supports the sweeping assertions in Petitioners' and the government's briefs, that an employer violates Section 510 if it decides to subcontract or outsource work based in part on a desire to reduce or eliminate the future costs of an employee welfare benefit plan. ITS does not reiterate the authorities and arguments set forth in Respondent Santa Fe's brief on this question. However, wholly apart from its consideration of the strained and unjustifiable interpretation of Section 510 advanced by Petitioners and *amici curiae*, the Court must examine the larger context in which these issues arise.

What Petitioners and the government gloss over is the fact that the modification to the employee welfare benefit plan at issue in this case was the product of permissible subcontracting and collective bargaining between ITS and the Union. According to the complaint, Santa Fe essentially decided to subcontract the intermodal work at the Hobart Terminal previously performed by SFTS employees.[9] The Union, as the exclusive collective bargaining representative, received notice of this decision, and of the identity of SFTS' successor. ITS, as

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[9] The complaint alleges that Santa Fe controlled SFTS. (Pet. App. 22a, ¶8.) To simplify the issue presented, ITS assumes, but does not concede, that Santa Fe and SFTS were in fact joint employers of the Hobart Terminal employees, and that Santa Fe's decision was to subcontract work at this terminal to ITS.

the successor employer, negotiated a new collective bargaining agreement with the Union that included the modified health benefits. Under these circumstances, acceptance of the interpretation of Section 510 that Petitioners and the government advance would eviscerate decades of case law under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, and upset the careful balancing among the various economic interests involved in a decision to subcontract that this Court has crafted under that statute.

This Court has long recognized that an employer's decision to subcontract a portion of its business may be a proper subject of collective bargaining, regardless of whether the decision is motivated by labor costs. So long as the employer meets its obligation to bargain with the representative of its employees, it is free to subcontract a portion of its business, and may base that decision on labor costs, including the cost of fringe benefit contributions, such as contributions to a union health plan. By the same token, a subcontractor that hires the majority of the employees likely will be a "successor," with certain rights and obligations under the NLRA. One of the rights generally enjoyed by a successor is the right to establish its own initial terms and conditions of employment for workers formerly employed by the contracting entity. Here again, so long as the successor meets its obligations to bargain with the pertinent labor organization, it is free to insist upon health benefits that are different from those enjoyed by employees before the subcontracting.

If Petitioners' position were accepted, it would have a devastating impact on the balance of interests of employees and employers in this context. Indeed, it

would be a rare case in which an employer would be able to escape a federal lawsuit, where the employees who were laid off were provided with a health plan. As the government has expressly stated in its brief:

> Where . . . there is evidence that an employer has contracted out its work, and thus discharged its employees, for the specific purpose of escaping obligations to pay benefits, the intent requirement is met. (US. Brief 22.)

Of course, there is no allegation here that anyone was "escaping" any payment of "benefits," only that Santa Fe and SFTS sought to reduce the cost of such benefits. In the vast majority of subcontracting decisions, a motivation, perhaps even the primary motivation, will be labor costs, a component of which is very often health plan costs. Employers have always been able to consider such costs in making a decision to subcontract. Under Petitioners' and the government's view, however, if employees are covered by a health plan, the costs of that plan can never be considered in deciding to subcontract work performed by these employees, to sell that portion of the business, or simply discontinue the business entirely.

It is no answer, as the government suggests, that an employer is free to eliminate the health plan before subcontracting. Where, as here, the contracting company is subject to a collective bargaining agreement, the **required** method of amending or terminating a health plan is through collective bargaining. That is precisely what occurred in this case. Indeed, the necessary implication of Petitioners' and the government's position is that once an

employer has agreed to a pension or health plan in collective bargaining, it can never negotiate a reduction in the contribution rates or prospective benefits under that plan, if its purpose is to reduce its costs. There is no support for this position in law or logic.

In sum, the interpretation of Section 510 for which Petitioners and the government argue is wrong, is squarely at odds with well-settled law under the NLRA and related statutes, and if adopted by the Court, would essentially overrule this Court's pronouncements on subcontracting and successorship under the NLRA. For these reasons, that interpretation should be rejected.

ARGUMENT

I. SETTLED LAW UNDER THE NATIONAL LABOR RELATIONS ACT PERMITS THE CONDUCT AT ISSUE IN THIS CASE.

A. Overview of Subcontracting and Successorship Principles Under the National Labor Relations Act.

In order to place the interpretation of Section 510 that Petitioners and the government urge in a proper context, it is necessary to review certain principles of law that have evolved under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA"), the federal statute perhaps most involved in the events described in the complaint. In particular, two areas of law under the NLRA are critical to this case. The first concerns an employer's right to subcontract work performed by union-represented employees, and the obligations it has to bargain with the

union about the decision to subcontract. The second area concerns the law of "successorship," including the obligations of a purchaser or subcontractor vis-a-vis the employees of the seller or contracting company. Examination of these two areas of NLRA-law reveal that what occurred in this case was appropriate and sanctioned by decades of case authority, and more importantly, that recognition of a potential claim under Section 510 of ERISA in these circumstances would seriously distort, indeed destroy, the careful balance among the interests of employer, employees and union in such situations established by numerous decisions of this Court.

The NLRA is a comprehensive statutory scheme that regulates the relationship between employers in interstate commerce and their employees. The NLRA thus seeks to enhance the free flow of commerce by encouraging employers and employees to resolve their differences and disputes through collective bargaining.[10] Indeed, the act "was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife." *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S.

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[10] Section 1 of this statute provides in pertinent part:

> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees. 29 U.S.C. § 151.

203, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964), *citing, NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42-43, 57 S.Ct. 615, 81 L.Ed. 893 (1937). To this end, the statute guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, ... " 29 U.S.C. § 157. These employee rights are secured by restrictions on the conduct of employers and labor organizations in the economic conflict that is collective bargaining. *Id.* at § 158(a), (b), (c) & (e). The agency established under the statute, the National Labor Relations Board ("NLRB" or "Board"), is tasked with acting both as neutral referee between labor and management, and enforcer of the interests and rights set forth in the act when either side commits an unfair labor practice.

One of the fundamental obligations the NLRA imposes on both employers and unions is to bargain "in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d). As this obligation has been interpreted by the Board and the federal courts, the subjects of collective bargaining have been divided into "mandatory," and "non-mandatory" matters. *See NLRB v. Wooster Division of Borg-Warner Corporation*, 356 U.S. 342, 349-50, 78 S.Ct. 718 (1958). Employers and unions are required to bargain about matters that are "mandatory" subjects of bargaining, and an employer may not unilaterally change any of the terms and conditions of employment of employees represented by a union, without bargaining with the union in good faith.[11] *Litton Financial Printing v. NLRB*, 501 U.S. 190, 198,

[11] Health benefits are, of course, a mandatory bargaining subject. *E.g., Stone Boat Yard v. NLRB*, 715 F.2d 441, 444 (9th Cir. 1983), *cert. denied*, 466 U.S. 937, 104 S.Ct. 1910, 80 L.Ed.2d 459 (1994). Accordingly, before an employer may alter the health benefits of union-represented employees, it must bargain in good faith with the union about such change.

111 S.Ct. 2215, 115 L.Ed.2d 177 (1991); *NLRB v. Katz*, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962).

An issue that has generated a great deal of litigation, and several opinions of this Court, is the question of when an employer's decision to subcontract work performed by union-represented employees, or any similar decision, such as to sell or close a portion of a business, or to transfer bargaining unit work to another location, is a mandatory bargaining subject. *Fibreboard Paper Products Corp. v. NLRB, supra; see also, First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 101 S.Ct. 2573, 69 L.Ed.2d 318 (1981). The resolution of this issue in any given situation turns primarily on the impact of the decision on employees, and on the perceived efficacy of collective bargaining as a means of affecting the decision. This Court has explained the basic framework of this issue as follows:

> Some management decisions, such as choice of advertising and promotion, product type and design, and financing arrangements, have only an indirect and attenuated impact on the employment relationship. . . . Other management decisions, such as the order of succession of layoffs and recalls, production quotas, and work rules, are almost exclusively "an aspect of the relationship" between employer and employee. *Chemical [and Alkali] Workers [v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178, 92 S.Ct.

> 383, 30 L.Ed.2d 341 (1971)]. . . . [A] third type of management decision, . . . is akin to the decision whether to be in business at all. *First Nat'l Maintenance Corp.*, 452 U.S. at 676-77.

The "third type" includes the decision to subcontract, to sell, to discontinue or to transfer a portion of the employer's business. *Id.* In determining whether this type of decision is a mandatory subject of bargaining in any given situation, the Board and the courts usually consider whether the employer's motive was to lower its labor costs, by "reducing the work force, decreasing fringe benefit payments," and the like. *Fibreboard Paper Products Corp.*, 379 U.S. at 213-14. If the desire to reduce labor costs is a significant consideration, then the decision is more likely a matter that should be discussed with the employees' collective bargaining representative before implementation. *Id.* Nevertheless, a central, although often unstated premise in the cases concerning this issue, is that it is entirely appropriate for an employer to base a decision to subcontract on labor costs, including the cost of relevant fringe benefits such as pension and health and welfare. If labor costs are a significant factor in the decision, then bargaining, it is assumed, might result in concessions by the union or other economic solutions to the labor cost issue that would reduce or even eliminate the need to subcontract. In none of these cases, however, whether decided before or after enactment of Section 510 of ERISA, is there any suggestion that basing a decision to subcontract on a desire to reduce the cost of fringe benefits or other employee expenses is improper. To the contrary, so long as its bargaining obligations are met, an

employer generally has a right under the NLRA to subcontract a portion of its business, even if that means termination of employees. *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 281, 92 S.Ct. 1571, 32 L.Ed.2d 61 (1972); *Fibreboard Paper Products Corp., supra.*

The other area of NLRA law that is critical to consideration of Petitioners' claims is that of "successorship." This body of case law concerns the obligations of an entity that acquires the business or assets of another, and the circumstances under which the "successor" company may be required to assume the "predecessor's" collective bargaining agreements, to bargain with the union representing the predecessor's employees, and/or to remedy its unfair labor practices.

The question of whether an acquiring entity is a "successor," and thus potentially obligated to assume bargaining and/or contractual obligations of the predecessor, turns on whether there is a "substantial continuity" of business enterprise from one entity to the other. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43, 107 S.Ct. 2225, 2236 (1987). As a practical matter, a determination that a subcontractor is a "successor" under the NLRA usually turns on the composition of the new entity's work force. *Burns, supra; NLRB v. Cutter Dodge, Inc.*, 825 F.2d 1375 (9th Cir. 1987); *see also, Howard Johnson Co. v. Detroit Local Exec. Bd*, 417 U.S. 249, 94 S.Ct. 2236, 41 L.Ed.2d 46 (1974); *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 94 S.Ct. 414, 38 L.Ed.2d 388 (1973). Thus, if a majority of the new company's work force, measured at a time when it employs a "representative complement" of employees, was employed by the prior entity, then the

new company generally is a successor. *See Fall River Dyeing*, 482 U.S. at 46 fn. 12.

A "successor" company assumes the predecessor's obligation to bargain with any incumbent union. *Burns, supra; Fall River Dyeing, supra.* Nevertheless, the successor has the right to set the initial terms and conditions of employment of its employees in most cases. *Id.; Spruce Up Corporation*, 209 N.L.R.B. 194, *enf'd*, 529 F.2d 516 (4th Cir. 1975). Accordingly, and again in most cases, the successor is not required to assume any collective bargaining agreements that may be in place, but rather is merely obligated to bargain with the incumbent union after establishing unilaterally the initial terms and conditions of employment for its employees. *Id.* It is thus entirely proper for the successor company, including one that hires all of the predecessor's employees, to institute its own fringe benefit plans, even though they are different from or provide lesser benefits than those of the predecessor, or to provide no such plans at all.

With the foregoing principles in mind, we now turn to the events that generated Petitioners' claim.

B. The Change in Teamster-Sponsored Health Benefits Resulting from the Subcontract to ITS Does Not Violate Section 510.

The events pleaded in the complaint as an alleged violation of Section 510 of ERISA are in fact eminently proper and indeed, dictated by NLRA successorship principles. The "new" employer, ITS, hired all of SFTS' employees and thereby assumed the obligations of a

"successor" to SFTS. As a successor, ITS had no obligation to assume SFTS' collective bargaining agreement with the Union, including the health plan adopted under that contract, but instead, had the right to establish its own initial terms and conditions of employment. In fact, ITS negotiated a new collective bargaining agreement with the Union as the exclusive bargaining representative of Petitioners and all their co-workers that provided for health benefits under a Teamster-sponsored plan. As alleged in the complaint, ITS' contribution rate to this plan was less than SFTS' rate had been, and the benefits provided under the plan were less than under the SFTS/Teamster plan. Nevertheless, the critical fact is that the process functioned precisely as it was supposed to under the NLRA principles set forth above. As a successor employer, ITS assumed an obligation to bargain with the Union and negotiated a contract that the Union signed. In short, the change in the Teamster-sponsored health plan was the proper outcome of good faith, collective bargaining, free from any Union claims of illegality or commission of unfair labor practices.

This result is no different from the consequences of any number of nondiscriminatory business transactions where the reorganization of a business or sale of assets results in the assumption of employer status by a new entity. Such transactions, involving the assumption of sponsorship of ERISA employee benefit plans by a new company, are commonplace and typically are motivated or necessitated by legitimate business or financial concerns. As such, the act of subcontracting and substituting ITS in the place of SFTS was simply the act of amending the health plan to substitute a new sponsoring employer.

The subcontracting arrangement did not, in and of itself, terminate the SFTS/Teamsters health plan with respect to the employees at issue or reduce the benefits available under the terms of the plan. The successor employer, ITS, continued to provide benefits to employees under the terms of a Teamsters health plan. Benefits were reduced pursuant to the plan amendment that resulted from the new collective bargaining agreement negotiated between the union and ITS. These actions plainly fall outside the strictures of Section 510.

The crux of Petitioners' claims under Section 510 is that the conduct of Santa Fe, SFTS and ITS that is expressly permitted, indeed fostered under the NLRA and the policies underlying that statute, may nevertheless be collaterally attacked under ERISA. The necessary implication of this premise is the virtual obliteration of carefully crafted principles and balancing of competing interests where an employer implements an economically-motivated change in the structure or direction of its business, and the evisceration of rights sanctioned under the NLRA. It also ignores the fact that collectively-bargained health plans that are subject to ERISA, are also subject to the NLRA and to Section 302(c)(5) of the Labor-Management Relations Act, 29 U.S.C. § 186(c)(5). As this Court has recognized, the principles under those latter statutes often control, even if ERISA may provide a remedy for or restrict the conduct at issue. *E.g., Laborers Health & Welfare Trust Fund etc. v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 108 S.Ct. 830, 98 L.Ed.2d 936 (1988).

The circumstances presented here amply demonstrate the conflict that arises if Petitioners' interpretation

of Section 510 is accepted. Santa Fe could and did subcontract work at the Hobart Terminal. The terms of the Union's agreement with SFTS are not part of the record here, and there is no way to determine whether that contract contained any provisions pertinent to SFTS' cessation of work at the terminal, or Santa Fe's possible subcontracting of that work. Assuming that Santa Fe and SFTS were in fact a single entity, as the complaint here strongly implies, the Union certainly could have negotiated a collective bargaining agreement that placed restrictions on subcontracting, or that required Santa Fe to impose the existing collective bargaining agreement on any successor to SFTS. *See Howard Johnson*, 417 U.S. at 258 n. 3. Similarly, the Union could have sought in negotiations with ITS that it would assume the collective bargaining agreement between the Union and SFTS, in order to continue the same health plan. The common thread shared by all of these possible scenarios is that they fundamentally are based upon the give and take of collective bargaining.

If Petitioners were correct in their interpretation of Section 510, however, Santa Fe would have to have **required** ITS to assume SFTS' obligations under the collective bargaining agreement, at least to the extent necessary to impose on ITS the same levels of employee benefits provided by the terms of the SFTS/Teamster plan. ITS, in turn, would have to have hired all of SFTS' employees because the termination of even a single employee, and resulting loss of future health benefits to that employee, presumably would constitute a "discharge" in violation of Section 510. Thus, here, and in every subcontracting situation, or for that matter, in

every sale or partial sale of a business involving a collectively-bargained health benefit or pension plan, the parties to the transaction would have to employ all the employees and sponsor the identical plan terms from one employer to the successor, or violate Section 510.

The claim that Santa Fe acted out of a desire to reduce the cost of health and pension benefits, and that only in such cases would there be a violation of Section 510, does not lessen the impact of Petitioners' contentions. It is likely that labor costs, including fringe benefit costs, are almost always a factor in an employer's decision to subcontract work, to sell, discontinue or reorganize a portion of its business, to relocate a facility, or any similar organizational or structural business decisions. NLRA law expressly recognizes this fact, and sanctions consideration of such costs. Indeed, failure to consider such cost factors in any decision that involved termination of employees receiving health benefits would not only be imprudent from a business standpoint, it would turn the question of whether the union had to be consulted on the decision completely on its head. Employers would have every incentive to ignore labor costs as an issue in such situations, thereby reducing or eliminating the role of the incumbent union.

It is also no answer to the problem outlined above that there are other ways of reducing fringe benefit costs than subcontracting. The government argues, for example, that "[t]he proper way for employers to reduce benefits-related costs is to amend or terminate the plan, according to the procedures prescribed in ERISA and the plan itself." (U.S. Brief at 11.) With all due respect, that is precisely what occurred in this case. In connection with

this subcontracting decision, ITS negotiated an amendment to the Teamster plan at issue. This was accomplished within the letter and intent not only of the NLRA, which governs the employment relationship, but also Section 302(c)(5) of the Labor-Management Relations Act, 29 U.S.C. § 186(c)(5), which governs the sponsorship and administration of the plan at issue. Under these statutes, SFTS could not unilaterally amend or terminate this health plan. Since the plan was mandated by an existing collective bargaining agreement, the proper procedure for "amendment" or "termination" was collective bargaining, subject to the collective bargaining agreement[12] and the express provisions of the plan itself. Accordingly, if Petitioners and the government were correct, there would be no proper way to "amend" or "terminate" such a plan.[13]

In sum, the interpretation of Section 510 urged by Petitioners and *amici* would seriously and adversely

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[12] Once agreement on a mandatory bargaining subject, such as a health benefit plan, is reached and embodied in a collective bargaining agreement, unless the parties have expressly agreed to renegotiate that subject during the life of the contract, they have no obligation to do so. *See NLRB v. Lion Oil Co.*, 352 U.S. 282, 77 S.Ct. 330 (1957); 29 U.S.C. § 158(d).

[13] Of course, this problem only occurs when there is an existing collective bargaining agreement. A non-union employer that intends to subcontract, with the result that employees will be laid off, may "terminate" a health plan shortly before the lay off. Presumably, under the government's method of avoiding a violation of Section 510, such an empty formality would suffice. ITS does not imply, however, that if SFTS had not had a collectively-bargained health plan, then Section 510 could have been violated. That issue is simply not before the Court.

impact the balance of rights and obligations crafted by the NLRB and the courts under the National Labor Relations Act, and related statutes. Further, it would significantly impair, or entirely eliminate an employer's right to structure its operations, and to expand or contract the scope of its business, whether through subcontracting, sale, plant closure or otherwise, a right this Court has repeatedly recognized and upheld. For these reasons, that interpretation must be rejected.

II. SECTION 510 DOES NOT SUPPORT A CLAIM UNDER THE ALLEGATIONS PRESENTED HERE.

Petitioners and *amici* may respond to the disturbing implications of their reading of Section 510 with the assertion that the plain language of that statute supports their position, and that these are policy arguments that should be addressed to Congress and not to this Court. As already noted, ITS will not repeat arguments and authority presented by Santa Fe to the Court concerning the proper interpretation of Section 510. Nevertheless, and in light of the foregoing discussion, ITS offers a few additional thoughts for the Court's consideration on this issue.

The actions prohibited by Section 510 are to "discharge, fine, suspend, expel, discipline, or discriminate" against employees. Of these prohibited actions, to "discharge" and/or "discriminate" are the only potential actions at issue in this case. Petitioners assume that because they and their co-workers were laid off by SFTS (only to be hired by ITS the next day), that the action at issue here, alleged subcontracting and resulting lay off, is

a "discharge" within the meaning of the statute. Considering the various prohibited actions in context, however, it appears that the mass lay off of employees due to a sale of a business or subcontracting is not an action that is contemplated by this term. To the contrary, the thrust of Section 510, like other discrimination statutes, seems to be the disparate treatment of individuals or groups of employees, within a larger group that is treated more favorably. While there is no legislative history that bears on this issue,[14] the term "discharge" does not reasonably include the lay off and next-day hire at issue here.[15]

By the same token, there was no discrimination, where all of the SFTS employees were treated the same way. Section 510 does not prohibit the identical treatment of a large group of employees based merely on the fact that they all were eligible for health benefits. Moreover, consideration of health benefit contribution costs is not "discrimination" unless the employer takes away an existing right. Here, there are no allegations that such actions occurred. Rather, all that Petitioners and their co-workers allegedly lost was the expectancy of future health benefits at a certain level. No right to those future benefits had

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[14] At least, ITS has not found any pertinent comments on this issue one way or the other in the over 5000 pages of legislative history on ERISA.

[15] The government suggests that the issue of whether the allegations in the complaint could establish a "discharge" within the meaning of Section 510 is not before the Court. (U.S. Brief at 25, fn. 15.) Contrary to this suggestion, the proper interpretation of Section 510 is the issue upon which the Court granted certiorari, and consideration of all the elements of this section is central to the issues presented.

"accrued," or "vested," and these employees therefore lost no present right.[16]

This conceptual problem also infects the mistaken interpretation of the phrase in Section 510 that is the subject of much more contention here, that the prohibited action must be taken "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." 29 U.S.C. § 1140. Implicit in this phrase is the concept that a violation of Section 510 necessarily entails treatment of an individual or group of individuals differently from other employees under an employee benefit plan. The archetypal violation

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[16] The distinction among an "expectancy," an "accrued right," and a "vested right" is vital to understanding the issue presented. For example, an employee who is just hired has an expectancy that he will receive pension benefits in the future, but he has no entitlement of any kind at that point. After the employee works for a few years, he has "accrued" time as a service credit. While that credit is a present right, unless the employee works for a minimum number of years, he may never actually receive a pension. He thus does not have a "vested" benefit until satisfying the conditions for vesting, usually a minimum number of continuous years of service. Nothing in ERISA prohibits interference with an expectancy, or from changing the rules on accrual and vesting in the future.

Health benefits, unlike pension benefits, except perhaps in hypothetical situations not present here, do not accrue or vest. Rather, employees only have an expectancy that benefits will continue in the future. ERISA, and in particular Section 510, does not prohibit in any fashion the reduction of health benefits in the future precisely because they do not accrue or vest. This is the essential distinction drawn by the Ninth Circuit below, between "altering the package of medical benefits" and "interfering with an employee's use of benefits provided." (Pet. App. 8a.)

of Section 510, for example, is the termination of an employee shortly before his pension benefits vest, in order to deprive him of those benefits. In that situation, the individual is terminated, while other employees who are or may become vested are not. Furthermore, and perhaps more importantly, the situation involves continuation of the pension plan itself, for without continuation of the plan, there are no benefits to which anyone "may become entitled."

This implicit requirement in Section 510, that the plan itself continue with respect to similarly situated employees, helps explain why an employer has the right to terminate or amend an employee benefit plan at any time, without running afoul of Section 510. As this Court recently recognized, "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans," *Curtiss-Wright Corp. v. Schoonejongen*, ___ U.S. ___, 115 S.Ct. 1223, 1228 (1995), and an amendment of an employee welfare benefit plan that deprives beneficiaries of some of the benefits of the plan in the future "is not a cognizable complaint under ERISA." *Id.* If a health benefit plan is terminated, then there simply are no prospective benefits to which anyone "may become entitled," and Section 510 therefore does not apply. In other words, the employees have lost a mere "expectancy," which is not protected under ERISA. (*See fn.* 15, *supra.*)

In essence, the act of subcontracting and substituting ITS in the place of SFTS had the necessary and inescapable consequence of amending the health plan to substitute a new sponsoring employer. When Santa Fe took the work away from SFTS, which resulted in the lay off of all

SFTS' employees at the terminal, SFTS had no continuing obligation to contribute to the Teamsters health plan because none of its employees continued to perform work covered by the collective bargaining agreement. At that point, none of these employees could ever "become entitled" to future benefits under that plan, because SFTS ceased to have any obligation to contribute, as did Santa Fe, if it ever had one. As such, the actions in question are an "amendment" of the original health plan, that plainly falls outside the strictures of Section 510.

Petitioners' and the government's argument in response to this presumably will be that SFTS' employees would have "become entitled" to future health benefits under SFTS' Teamster-sponsored plan, if Santa Fe had not subcontracted the work to ITS. This argument simply proves too much. If the phrase in question is interpreted in this manner, then any elimination of a health plan would also necessarily be prohibited by Section 510. In any case of plan termination, employees could argue that but for the termination they would have "become entitled" to future benefits under the plan, and that such termination is "discrimination" against the entire covered group. Such an argument is not substantively distinguishable from that advanced by Petitioners, that but for the subcontracting, SFTS employees would have become entitled to benefits under the existing plan. Since all concede, however, that outright termination of a plan is not a prohibited act, Petitioners' interpretation stretches the phrase "may become entitled" far beyond its original intent and plain meaning.

In short, the reduction of health benefits at issue here lies outside of Section 510's prohibitions, the same as

does an employer's unilateral decision to reduce benefits in the future. This is especially true because the modification of the Teamster-sponsored plan was accomplished in full accord with long-settled principles and procedures under the NLRA and the terms of the plan. This "amendment" is plainly allowed under ERISA, and is not prohibited by Section 510.

CONCLUSION

ITS respectfully submits that none of Respondents could be found liable for a violation of Section 510 on the facts pleaded in the complaint. The Court should so rule.

DATED: February 11, 1997

Respectfully submitted,

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In-Terminal Services

APPENDIX

RESPONDENT IN-TERMINAL SERVICES' REQUEST TO TAKE JUDICIAL NOTICE

Respondent In-Terminal Services ("ITS") hereby requests the Court to take judicial notice of the following facts, pursuant to Rule 201 of the Federal Rules of Evidence. This request is based upon the declaration of Patrick W. Jordan, Esq., set forth herein below. The Court should take notice of the following facts:

1. Teamsters Union, Local No. 63, and Teamsters Union, Local No. 208, affiliated with the International Brotherhood of Teamsters, AFL-CIO (jointly "Union"), represented the employees of Respondent Santa Fe Transfer Services ("SFTS") at the Hobart Terminal in Los Angeles County, at all times pertinent to the complaint in this case, and specifically, in March 1990.

2. The Union did not file suit in state or federal court challenging the decision of Respondent Atchison, Topeka and Santa Fe Railway Company ("Santa Fe") to transfer work at the Hobart Terminal in or about March 1990, from SFTS to ITS, or challenging the transfer itself. The only legal action taken by the Union was to file a lawsuit against Santa Fe and SFTS alleging a violation of the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 *et seq. Wholesale & Retail Food Employees (Teamsters) Local 63 v. Santa Fe Terminal Services, Inc.*, 826 F.Supp. 326 (C.D. Cal. 1993).

3. The Union did not file any unfair labor practice charges challenging the decision of Respondent Santa Fe

to transfer work at the Hobart Terminal in or about March 1990, from SFTS to ITS, or challenging the transfer itself.

4. The Union did not file any grievances under the collective bargaining agreement it had with SFTS challenging the decision of Respondent Santa Fe to transfer work at the Hobart Terminal in or about March 1990, from SFTS to ITS, or challenging the transfer itself.

5. ITS negotiated a collective bargaining agreement with the Union in March 1990 that provided for health benefits under a Teamsters-sponsored, multi-employer plan.

DECLARATION OF PATRICK W. JORDAN IN SUPPORT OF REQUEST TO TAKE JUDICIAL NOTICE

I, Patrick W. Jordan, Esq., state and declare as follows:

1. I am an attorney licensed to practice law in the State of California, and am a member of the bar of the United States Supreme Court. I make this declaration of my own personal knowledge, and if called upon to do so, I could and would competently testify to the truth of each and ever fact set forth in this declaration.

2. Since the late 1980's I have represented Respondent In-Terminal Services ("ITS") for purposes of labor relations, union negotiations and related administrative and litigation matters. ITS was a division of Respondent

Mi-Jack Products, Inc. at the time my representation began. ITS is now a separate corporation, and a wholly-owned subsidiary of Mi-Jack Products, Inc. I represented ITS in all labor litigation matters in California since the late 1980's, and in particular, have represented ITS in all such matters that have arisen concerning the Hobart Terminal in Los Angeles. I am counsel for ITS in the matter now pending before the Court, and in other litigation brought by Petitioner Inter-Modal Rail Employees Association ("Association") against ITS, including *Inter-Modal Rail Employees Association, et al. v. Burlington Northern and Santa Fe Railway Company, et al.*, San Francisco Superior Court Case No. 975 406. In addition, I am counsel for ITS in a lawsuit brought by the Union in connection with ITS' cessation of work at the Hobart Terminal in January 1995, now pending in the United States District Court for the Central District of California, captioned and docketed in that court as *Teamsters Local 63, International Brotherhood of Teamsters, AFL-CIO v. In-Terminal Services, et al.*, USDC Case No. 95-8593 GHK (Ex). I have been counsel for ITS in connection with all grievances filed by the Union at the Hobart Terminal from March 1990 through 1995 that progressed to a demand for arbitration, and all unfair labor practice charges filed by the Union concerning the Hobart Terminal during that same time period. I also was counsel and chief negotiator in the negotiation of a collective bargaining agreement between the Union and ITS in March 1990 concerning employees at the Hobart Terminal.

3. To the best of my recollection, the Union did not file any lawsuits, state or federal, any unfair labor practice charges, or any grievances challenging in any way

the transfer of work at the Hobart Terminal from Santa Fe Transfer Services to ITS that occurred in or about March 1990. The only legal action taken by the Union was to file a lawsuit against Santa Fe and SFTS alleging a violation of the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 *et seq.*, claiming that SFTS' employees had been given insufficient notice of termination under that statute. This suit resulted in a published opinion, *Wholesale & Retail Food Employees (Teamsters) Local 63 v. Santa Fe Terminal Services, Inc.*, 826 F.Supp. 326 (C.D. Cal. 1993). At all times from and after ITS assumption of work at the Hobart Terminal in or about March 1990, until Santa Fe terminated ITS' contract in January 1995 for work at that terminal, ITS had a collective bargaining agreement with the Union covering employees at the Hobart Terminal. The collective bargaining agreement I negotiated on ITS' behalf in March 1990 obligated ITS to make contributions on behalf of employees to a Teamster-sponsored, multi-employer health benefit plan.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 11th day of February, 1997, at San Francisco, California.

/s/ _____
PATRICK W. JORDAN